

**FILED**

**SEP 24 2012**

**PATRICK E. DUFFY CLERK**  
BY Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF MONTANA**

**BILLINGS DIVISION**

<b>24 HOUR FITNESS USA, INC.,</b>	)	<b>CV-11-141-BLG-RFC-CSO</b>
<b>dba 24 HOUR FITNESS,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>vs.</b>	)	
	)	<b>ORDER ADOPTING FINDINGS</b>
	)	<b>AND RECOMMENDATIONS OF</b>
<b>JEREMY TIMM,</b>	)	<b>U.S. MAGISTRATE JUDGE</b>
	)	
<b>Respondent.</b>	)	
<hr/>	)	

United States Magistrate Judge Carolyn Ostby has entered Findings and Recommendation (doc. 16) with respect to the Petition to Compel Arbitration (doc. 1) and Timm's Motion to Dismiss (doc. 9). Judge Ostby recommends this Court dismiss this action without prejudice under the "first to file" rule because Respondent filed a nearly identical action in the Northern District of California before this action was filed. *See Pacesetter Systems, Inc. v. Mediatronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982).


Upon service of a magistrate judge's findings and recommendation, a party has 14 days to file written objections. 28 U.S.C. § 636(b)(1). Although 24 Hour Fitness did not file formal objections, it did notify this Court that Judge Samuel Conti of the United States District Court for the Northern District of California, who is presiding over the previously-filed action, precluded 24 Hour Fitness from proceeding in this Court. Doc. 17. 24 Hour Fitness nonetheless asks this Court to stay these proceedings until Judge Conti's Order becomes final.

In any event, the finality of Judge Conti's Order is irrelevant to whether Judge Ostby correctly recommended that this Court decline jurisdiction over this action. The fact is, Timm's similar action was filed first in a court that is more familiar with the parties' dispute. Judge Ostby's recommendation promotes the interests of federal comity and judicial efficiency. It is therefore adopted in its entirety.

Accordingly, **IT IS HEREBY ORDERED** that 24 Hour Fitness's Petition to Compel Arbitration (doc. 1) is **DENIED** and Timm's Motion to Dismiss (doc. 9) is **GRANTED**; this matter is **DISMISSED WITHOUT PREJUDICE**.

The Clerk of Court is directed to notify the parties of the entry of this Order and close this case.

DATED the 24<sup>th</sup> day of September, 2012.



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RICHARD F. CEBULL  
UNITED STATES DISTRICT JUDGE